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In the Supreme Court of the United States

No. 75-22

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HERTZKA & KNOWLES,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent Hertzka & Knowles submits this brief in opposition to the Petition for a Writ of Certiorari heretofore filed by the Solicitor General of the United States on behalf of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 503 F.2d 625. It is reproduced as Appendix A to the Petition. The Decision and Order of the Board is reported at 206 NLRB 191. It is reproduced as Appendix D to the Petition.

JURISDICTION

The Board's petition for rehearing was denied on April 2, 1975; the judgment of the Court of Appeals was entered on April 9, 1975.[1] Jurisdiction here is invoked by petitioner under the provisions of 28 U.S.C. 1254(1).

QUESTION PRESENTED

We differ with the Board as to the question presented. We think that two questions arise:

> Whether the Board properly concluded from the evidence adduced that the committees of the employer's employees were not freely constituted in consonance with the provisions of Section 7 of the Act, and
>
> Whether a Circuit Court can reject a finding by the Board that a violation of Section 8(a)(2) has occurred as not supported by substantial evidence on the record considered as whole, although the record so considered supports evidence of violation of Section 8(a)(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat 136, 73 Stat 519, 29 U.S.C. 151 *et seq.*), are:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

1. A copy of the petition for rehearing appears at 15a, App. B to the Petition; a copy of the judgment appears at pp. 16a-20a, App. C to the Petition.

> "Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> "(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> • • • • •
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> "Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purpose, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:"
>
> • • • • •
>
> "Sec. 10. (f) . . . the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

STATEMENT

In September of 1971 the Board certified the Organization of Architectural Employees (OAE)[2] as the bargaining representatives of the architectural employees of Hertzka & Knowles (Hertzka). Fourteen months of bargaining ensued but no agreement was reached.

In November of 1972 a decertification petition was filed by an employee named Richard Nyros (P. 28a).[3] Nyros and other employees arranged for a series of meetings during noon lunch hours so that the employees could cast an informed vote at the impending election (P. 28a).

The first such meeting was devoted to an exposition of what the OAE could do for the employees; an hour was spent by Peter Ekstein, Executive Secretary of OAE, "in presenting the Union's side for employee representation" (P. 28a, 29a).

At the second meeting three employees of Skidmore, Owings & Merrill (SOM) another architectural firm talked with Hertzka and Knowles employees and explained a "committee plan of organization" which had been, at SOM, "utilized as an alternative to union representation" (P. 29a).

The third meeting was held on November 29. Company Vice President George Hanna reviewed the course of contract negotiations and explained the position of Hertzka and Knowles vis-a-vis union representation (P. 30a). The December 1 meeting was a continuation of the meeting of November 29. The Section 8(a)(1) violations found by the

2. Sometime later, probably in September of 1972, OAE affiliated or merged with United Brotherhood of Carpenters & Joiners of America, AFL-CIO.

3. References preceded by "P." are to the Petition; the numerals are of course page numbers.

Board and affirmed by the Circuit occurred at this meeting (P. 4a-8a).

On December 6, the Board conducted the decertification election. The vote was 14 to 11[4] against further representation by OAE.

On December 7 all of the employees and principals save Knowles (one of the two owners of the enterprise) (Tr. 315, 341)[5] met in the Company's drafting room (P. 43a, Tr. 106, 194). This meeting was requested by an employee (Tr. 276). Hanna conducted the meeting (Tr. 167),[6] and opened it by observing that while it was evident from the tally of ballots that the employees had chosen "not to go the union route", the "eleven votes in favor of the union would have to be taken into account" (Tr. 167). Hanna then proposed consideration of an alternative structure for dealing with "problems of the employees." "He wanted the proposals to come from the people there" (Tr. 168, 194).

Petitioner asserts that an employee Dennis Smith thereupon suggested the establishment of a committee system "similar to what they had at SOM" (P. 5). No citation to the record is given to explain petitioner's use of quotation marks.

Smith himself testified that the committee system he proposed was taken from an early proposal of OAE, i.e., a proposal made by the union to Hertzka & Knowles during the 14 months of negotiations (Tr. 195-196). Smith also

4. The Administrative Trial Judge found that on November 2, 1972 the employees "voted to strike" (P. 28a). What he did not explicate was that only 11 of the 25 employees voted to strike (Tr. 83). This scarcely qualifies as a thumping vote of confidence.

5. It is uncontradicted that Knowles was not present.

6. The meeting was so informal that one employee doubts that anyone was chairman (Tr. 276).

said that when he proposed the committees at the December meeting he had "no thought of this policy council from SOM" (Tr. 216, ls 1-8).

Petitioner asserts that "management representatives took an active part on the committee." (P. 6). Passing by that ambiguity, we point out that the system envisions that the management member of each committee (he cannot be its chairman) is obligated to forward any resolution his committee may make "to the remainder of management individuals and get their approval" (Tr. 208, ls 6-8).[7]

While it is true that committee meetings were held on Company premises at lunch time or on Company time without loss of pay, it is also true that the bargaining sessions during the 14 months of negotiations with OAE were held on Company premises and (sometimes) during working hours, and that Company employees on the negotiating committee did not suffer loss of pay (Tr. 237, 467-469).

THE BOARD'S DECISION AND ORDER

The Board found, *inter alia*, that the committee system constituted a labor organization (P. 48a-50a). It also found that this labor organization was dominated and assisted by the Company in its formation and administration, in violation of Section 8(a)(1) and (2) of the Act.

The Law Judge did not accept the Company's contention that its role was that of cooperation (P. 50a-51a).

7. Smith, the progenitor of the committees, testified:
"Basically what I pictured this to be was . . . that the management individual would take an active part in the committee structure, and would have just as many rights or privileges on that committee as any other member of the committee, but would not be allowed to be the chairman of the committee because I did not want the management individual to dominate the committee . . ." (Tr. 207, ls 22-25; Tr. 208, ls 1-3).

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals rejected the inaccurate, unfounded and conclusionary language of the Law Judge[8] that the committees were formed by and are dominated by management.

It found that which is plainly to be found from the evidence, i.e., that the committee system was suggested by an employee, that its source was an OAE proposal[9] made during the unsuccessful negotiations and that this suggestion was overwhelmingly approved by the employees. It also found that an employee suggested that partners vote on that proposal and that this suggestion was "enthusiastically embraced" and unanimously passed (P. 9a-10a).

It also found that management members vote on some committees and not on others, as the evidence shows, and that the management member, as are other members, consulted as to times of meetings (P. 10a, 13a).

The Circuit also found that Section 8(a)(2) is, in part, a means to the central theme of the Act, i.e., employee free choice and employee self-organization, for Section 8(a)(2) seeks to permit employees freely to assert their demands for improvements in working conditions.

In short, the Circuit found that there was no substantial evidence that Hertzka & Knowles violated Section 8(a)(2).

8. "The committees were formed in a meeting of employees on December 7, called for that express purpose by management and presided over by management, at which all the management executives attended and approved the formation of a committee system which could function only in the presence of, and with the attendance of a management representative who by his mere presence and participation destroys the independence of the committee" (P. 51a).

9. i.e., that it was *not* modeled after the SOM system.

ARGUMENT: REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The decision of the Circuit in this case presents no novel question under 8(a)(2) nor under any other section of the Act, nor does the decision "impose any limitation" upon Section 8(a)(2), or upon the Act otherwise. On the contrary, the decision below explicitly recognizes that the rights of employees freely to organize and to be represented as they wish to be represented[10] are protected by Section 7, and are not to be taken from employees where the domination or interference condemned by Section 8(a)(2) is not real domination or interference, or where a finding of the presence of either is not supported by substantial evidence on the record considered as a whole.

National Labor Relations Board v. Link-Belt Co., 311 U.S. 584, does not stand for the broad interdiction which the Board ascribes to it. That decision recognizes, as did the Ninth Circuit in the case at bar, that an "inside union" as well as an "outside union" may be the product of the right of the employees to self-organization and to collective bargaining through representatives of their own choosing, as guaranteed by Section 7 of the Act. 311 U.S. at 587.

The sole question posed in *Link-Belt* was:

> ". . . whether the Board was justified in concluding that [the] Independent [union] was not the result of the employees' free choice because the employer had intruded to impair their freedom." (311 U.S. at 587).

10. The Board complains (P. 13, fn 9) that it would be "premature to assume employee satisfaction" with the committee system. There is no need to "assume" it. The uncontradicted testimony was that the committees fairly represented the employees, Tr. 281. Th Law Judge permitted no other testimony along those lines, with the observation: "I really think the issue here is not whether the committees represent the employees . . ." (Tr. 282).

In finding that the "whole congeries of facts before the Board" (311 U.S. 588) supported its finding that Independent was dominated, the Court noted the following factors:

1. the employer's "long standing industrial espionage" (311 U.S. at 588);
2. evidence of the employer's "hostility" towards an "outside union" (311 U.S. at 588);
3. the discharge of five employees for union activity (311 U.S. at 589-590, 601-603);
4. the insistence by foremen or leadmen that employees join the Independent (311 U.S. at 591-596); and
5. the conditioning of employment upon membership in the Independent (311 U.S. at 601).

In marked contrast, Hertzka & Knowles discharged no one, conditioned no one's employment upon union membership or non-membership, and conducted no "industrial espionage." While the Law Judge found that Hertzka & Knowles interfered with the employees' free and uncoerced choice in the decertification election, he made no specific finding of hostility.[11]

Moreover, there is no finding nor is there indeed any showing that the decertification of OAE is linked to the creation of the committee system. While the latter followed the former, no causative effective is shown. *Post hoc ergo propter hoc* is neither good logic nor good law.[12] One

11. An employer is to be regarded as a "rightful contestant for his employees' loyalty in a union election." *Texas Industries v. NLRB,* 336 F.2d 128 at 130 (5th Cir. 1964); and see the cases to this end also at 336 F.2d 130.

12. *Tampa Times v. National Labor Relations Board,* 193 F.2d 582 (5th Cir. 1952).

may not say reasonably that *because* OAE was decertified in an election tainted by Section 8(a)(1) violations, the committee system is therefore violative of Section 8(a)(2).

For each of these propositions must stand upon its own evidentiary feet. The Circuit found that while the Section 8(a)(1) violations presented close questions, it would defer to the conclusions of the Law Judge upon the thesis that there was substantial evidence to support the findings.[13]

Since the Circuit did not, however, find substantial evidence to support the finding that Hertzka had violated Section 8(a)(2) (P. 13a), it could not enforce the fruit of that finding. We turn, then, to a brief examination of the substantial evidence requirement of Section 10(e), and its application to this case.

This Court has held that the "substantial evidence" clause of Section 10(e) of the Act means exactly what it says, viz., that Board findings shall be conclusive only if supported by substantial evidence. *Consolidated Edison Co. of New York v. National Labor Relations Board,* 305 U.S. 197 at 229. In *National Labor Relations Board v. Columbian Enameling & Stamping Co.,* 306 U.S. 292 at 299-300, the Court observed that the phrase equates with evidence affording a substantial basis of fact from which the fact in issue can reasonably be inferred, or, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and, finally, that kind of evidence which, if the trial were to a jury, would justify a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

The issue here, no matter in what mold it is cast by the Board, is whether the committee system at Hertzka sprang

13. "Again, although we are troubled by this finding, we think there is substantial evidence to support it" (P. 8a).

freely from the minds of the employees. The Law Judge, again, said the committee system was patterned after the SOM committee system and that it was adopted at a meeting called by management (P. 48a, 49a).

It is the uncontradicted testimony of the pr[illegible]or of the committee system that when he proposed the system he was not thinking of the SOM committee, but rather had in mind a proposal made by OAE during the course of its negotiations with Hertzka & Knowles (Tr. 216, Tr. 195-196). It is also uncontradicted that the meeting at which this proposal was made was requested by an employee (Tr. 276).

There are facts. One cannot get from those facts to the conclusions that the meeting was "called" by management[14] and that the committee system is patterned after the SOM scheme. Or if one does arrive at these conclusions he has not walked a path which can fairly be labelled "substantial evidence."

It is suggested in some cases that employee satisfaction or dissatisfaction with an independent union should be given considerable weight in determining the issue of domination *vel non.* The thesis is that if the employees think that they have not been well or faithfully represented by the independent union, then their choice of a successor is likely to be made with some care. See, for example, *Chicago Rawhide Manufacturing Co. v. National Labor Relations Board,* 221 F.2d 165 (7th Cir. 1955); *Coppus Engineering v. National Labor Relations Board,* 240 F.2d 564 (1st Cir. 1957); and *Modern Plastics v. National Labor Relations Board,* 379 F.2d 201 (6th Cir. 1967).

14. Since the meeting was asked for by an employee, a conclusion which states only that it was called by management is something less than the whole truth

This thesis, it seems to us, is nothing more than an explicit recognition of the underlying policy of the Act to protect "the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . ." This policy, found of course in Section 1, is echoed in Section 7 of the Act, in which it is established as a matter of right.[15]

Since employees *are* guaranteed the right to organize as they choose, some of the later cases have, and we think wisely, required a showing of actual domination rather than a possibility of domination.[16] This is no more than a requirement that interference with this right to organize must be proved by ". . . substantial evidence on the record considered as a whole." Illustrative cases are *National Labor Relations Board v. Post Publishing House,* 311 F.2d 565 (7th Cir. 1962); and *Chicago Rawhide Manufacturing Co., supra.*

It is *a fortiori* true that conduct which might constitute domination as to one person will have no effect upon another. This circumstance gives added validity to the proposition that actual domination must be shown, and raises, of course, the question of *how* it is to be shown. A number of courts have sensibly answered this question by determining the state of mind of the employees within the labor organization; if the organization exists as the result of a choice freely made, in their own interests, and freely represents the employees, it is not dominated, nor has the employees' right to organization been interfered with.[17] Cases in at least five circuits advance this view.[18]

15. It is true beyond peradventure that the Congress intended the Act as a grant of right to employees rather than as a grant of power to international unions. See *National Labor Relations Board v. Mid-States Metal Products, Inc.,* 403 F.2d 702 (5th Cir. 1968).

16. Section 8(a)(2) does not forbid the possibility of domination or interference.

It is sharply put in *Chicago Rawhide, supra,* at 221 F.2d 167:

> "The test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees."

We urge that this school of thought is sound, and is even more compelling in the setting of this case. The employees involved here are architectural employees; they are professionals; they are sensitive, well-educated, and self-controlled enough to practice a demanding discipline. As the Circuit remarked, the committee system rather than a "formally organized union" is not unreasonable ". . . given the close contact that must exist between partners and professional associates in an architectural firm." (P. 13a).[19]

What the Board really wants here is the relegation of the Circuits to the role of a judicial echo of its findings. See *National Labor Relations Board v. Tri-State Casualty*

17. To put it another way, if credible evidence to those conclusions exists, there can be no substantial evidence on the record considered as a whole that the organization is dominated, or that the employees' right to organize has been interfered with.

18. *National Labor Relations Board v. Sharples Chemicals, Inc.,* 209 F.2d 645, 652 (6th Cir. 1954); *Independent Employers Association of Neptune Meter Co. v. National Labor Relations Board,* 158 F.2d 448, 450 (2nd Cir. 1946); *National Labor Relations Board v. Prince Macaroni Manufacturing Co.,* 329 F.2d 803, 811 (1st Cir. 1964); *National Labor Relations Board v. Wemyss,* 212 F.2d 465 (9th Cir. 1954); *Chicago Rawhide Manufacturing Co. v. National Labor Relations Board, supra* (7th Cir. 1955).

19. The thesis that the adversarial posture of labor relations is not necessary nor desirable in units of professionals or of well-educated employees is ably advanced in Note, *New Standards for Domination and Support Under Section 8(a)(2),* 82 Yale L.J. 510, 516-519.

Ins. Co., 188 F.2d 50, 53 (10th Cir. 1951); and *National Labor Relations Board v. Buddies Supermarket, Inc.*, 481 F.2d 714, 722 (5th Cir. 1973). But this is not what the Congress envisioned. Indeed, Section 10(e) of the original Act provided that ". . . the findings of the Board if supported by evidence, shall be . . . conclusive." Act of July 5, 1935, PL 198, 49 Stat. 455. The present language (Section 10(e) is now Section 10(f)) dates from June 23, 1947, PL 101, 61 Stat. 148. The reason—or at any rate a reason—for the change was Congressional concern that the courts had abdicated their traditional duty of the evaluation of evidence as either probative or illusory. See Report of Committee on Conference Home Report No. 510, June 3, 1947, p. 1135, at p. 1162, U.S. Code Congressional Service, 80th Congress, First Session; reprinted in 1 Legislative History 560.

We recognize, although with some dismay, that the Board is so long endowed with a quality of expertise that it is almost idle to attack that endowment. That expertise, however, does not reach the evaluation of evidence.

This is plain enough from *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, 490, in which the Court observed that courts must assume responsibility for the "reasonableness and fairness of Labor Board decisions, and that reviewing courts must not abdicate the conventional judicial function." A reviewing court is not, this Court has said, barred from setting aside a Board decision when it cannot "conscientiously find that the evidence supporting that decision is substantial", when viewed in the light that the record in its entirety sheds upon the matter. *Universal Camera, supra*, at 340 U.S. 488.

CONCLUSION

This is simply one more case in which the Board has failed to support its findings by substantial evidence on the record as a whole. We urge that the Petition for a Writ of Certiorari should be denied.

Dated: August 18, 1975.

Respectfully submitted,

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